91-1347

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SALVATORE R. CURIALE, Superintendent of Insurance of the State of New York, as Liquidator of Union Indemnity Insurance Company of New York,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Mathias E. Mone
Counsel of Record
Adam Liptak
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

William F. Jerome
State of New York
Insurance Department
Liquidation Bureau
123 William Street
New York, New York 10038

Attorneys for Petitioner

QUESTION PRESENTED

Does the McCarran-Ferguson Act require that priority schemes contained in state insurance statutes, rather than the general Federal Priority Statute, govern the priority of distribution of the assets of insolvent insurance companies?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ____

SALVATORE R. CURIALE, Superintendent of Insurance of the State of New York, as Liquidator of Union Indemnity Insurance Company of New York,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Salvatore R. Curiale, Superintendent of Insurance of the State of New York, as Liquidator (the "Liquidator") of Union Indemnity Insurance Company of New York ("Union") respectfully prays that a writ of *certiorari* issue to review the judgment of the Appellate Division, First Department, of the Supreme Court of the State of New York entered on February 21, 1991. Successive timely motions for leave to appeal to the Court of Appeals of the State of New York were denied without opinion by the Appellate Division and the Court Appeals by orders entered June 13, 1991 and November 25, 1991, respectively.[1]

1 New York procedural law allows for two separate motions for leave to appeal to the Court of Appeals—one directed to the Appellate Division and a subsequent one directed to the Court of Appeals if the first motion is unsuccessful. N.Y. Civ. Prac. L. & R. 5602(a) (McKinney Supp. 1992).

OPINIONS BELOW

The order and judgment of the Appellate Division is reported at 170 A.D.2d 342, 566 N.Y.S.2d 853 and is set forth in the Appendix to this Petition ("App.") at 1a. That order and judgment adopted the reasoning of the court below, the Supreme Court of the State of New York, New York County (Gammerman, J.). The New York Supreme Court's opinion is reported at 146 Misc. 2d 558, 551 N.Y.S.2d 446 and is set forth in the Appendix at 3a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Appellate Division, First Department, of the Supreme Court of the State of New York entered February 21, 1991 is invoked under 28 U.S.C. § 1257(a) (1988); the Petition is being timely filed within 90 days of the November 25, 1991 denial by the Court of Appeals of the State of New York of the Liquidator's timely motion for leave to appeal to that court.

STATUTES INVOLVED

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1988), provides in relevant part:

> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless

> such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012 (1988).

The Federal Priority Statute, 31 U.S.C. § 3713 (1988), provides:

> (a)(1) A claim of the United States Government shall be paid first when—
>
> > (A) a person indebted to the Government is insolvent and—
> >
> > (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
> >
> > (ii) property of the debtor, if absent, is attached; or
> >
> > (iii) an act of bankruptcy is committed; or
> >
> > (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
>
> (2) This subsection does not apply to a case under title 11.
>
> (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

The relevant provisions of the New York Insurance Law (McKinney 1985 & Supp. 1992) are set forth in the Appendix.

STATEMENT OF THE CASE

Preliminary Statement

The decision below is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Fabe* v. *United States Department of the Treasury*, 939 F.2d 341 (6th Cir. 1991) ("*Fabe*"). The United States has applied in this Court for an extension of time to March 20, 1992 in which to file a petition for a writ of *certiorari* in *Fabe*. *See* Application for an Extension of Time in *United States Department of the Treasury* v. *Fabe* (No. A-575), dated February 7, 1992 (the "Application"). We are informed that the Application was granted on February 10, 1992.

The decision of the Sixth Circuit in *Fabe*, as discussed below and as acknowledged by the United States in its Application, is in direct conflict with decisions of state courts, including the decision below. *See* Application at 4-5 ("[a]s the court of appeals acknowledged (939 F.2d at 348), the decision in this case conflicts with the decisions of two of the other [federal] courts of appeals that have decided this issue. . . . The court of appeals' decision also conflicts with decisions of state courts," citing, *inter alia*, the decision below).

We respectfully suggest that this Court defer consideration of this Petition until briefing in connection with both petitions is complete. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 5.9, at 274 (6th ed. 1986).

Proceedings Below

By an order of liquidation entered on July 16, 1985, the Supreme Court of the State of New York, New York County, determined that Union was insolvent and directed the Superintendent of Insurance of the State of New York to take possession of and liquidate its business and affairs

(App. 12a). The order of liquidation directed all persons having claims against Union to file proofs of claim (App. 14a-15a), and the Internal Revenue Service ("IRS") duly and timely filed such a proof of claim (R. 33).[2] In addition to setting out the sums the IRS claimed were owed it as to certain excise taxes, interest and penalties,[3] the proof of claim also asserted that

> This debt has priority and must be paid in full in advance of distribution to creditors to the extent provided by law: See Section 3466 of the Revised Statutes (31 U.S.C. 191) [now 31 U.S.C. § 3713(a)]. Any executor, administrator, or other person who fails to pay the claims of the United States in accordance with its priority may become personally liable for this debt under Section 3467 (31 U.S.C. 192) [now 31 U.S.C. § 3713(b)] (R. 33).

The proof of claim asserted no lien or security interest in favor of the IRS and made no claim to any priority under the law of New York.

On March 23, 1989, the Liquidator filed a petition in the trial court requesting disallowance of the IRS's assertion of first priority (as opposed to general creditor) status (R. 27-32). On May 22, 1989, the IRS filed an objection to the petition (R. 34-37). The IRS's principal objection, and the only one that has not since been resolved by stipulation between the parties, was that "[b]y federal statute, a claim by the United States against an insolvent person is to be given priority over other claims against the insolvent person" (R. 34).

The parties thereafter submitted memoranda of law to the trial court below directed *solely* to the federal question of whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1988) ("McCarran-Ferguson"), mandates that state

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2 The notation "R. [page number]" refers to the Record on Appeal filed in the court below.

3 The parties subsequently stipulated that the total allowed claim of the IRS for federal taxes, interest and penalties is $137,245.18 (R. 38-39).

rather than federal law governs the priority of the IRS's claim. The trial court below, like the appellate court which adopted its reasoning, ruled on this question alone (App. 1a, 3a).[4]

The Decisions Below

The question of whether, in the distribution of the assets of an insolvent New York insurer, the United States is to be treated like any other claimant or as having priority over all other claimants, including policyholders, turns on whether the New York Insurance Law (McKinney 1985 & Supp. 1992) or the general Federal Priority (or Insolvency) Statute, 31 U.S.C. § 3713 (1988), governs.

Article 74 of the New York Insurance Law, which is part of the State's comprehensive scheme regulating the business of insurance, establishes a complex regulatory and judicial system to deal with the liquidation of insolvent insurance companies. Under this statute, general unsecured claims of the United States are accorded the same priority as those of policyholders and other general creditors. *See* N.Y. Ins. Law

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4 In its appellate brief, the United States devoted three pages to a newly advanced argument—that the New York Insurance Law may be read to include a first priority for the United States notwithstanding the absence of a single word in the statute to that effect. Brief for Respondent-Respondent, dated October 31, 1990, at 39-41. The Appellate Division did not address this argument (App. 1a), and its decision thus only construes federal law. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). The United States continued weakly to press this argument in its brief in opposition to the Liquidator's motion for leave to appeal to the Court of Appeals. Respondent's Brief in Opposition to Appellant's Motion for Leave to Appeal, dated September 6, 1991, at 11-13. The Court of Appeals denied the motion without opinion (App. 8a). This Court has declined to assume that such a decision may have been based on a state law ground even where, unlike here, the state trial court in question had rested its decision on state law. *Cicenia* v. *La Gay*, 357 U.S. 504, 507-08 n.2 (1958) ("[t]he State Supreme Court gave no reasons for denying leave to appeal . . . [and] we shall not assume that the New Jersey Supreme Court's decision denying leave to appeal was based on th[e] nonfederal ground"). *See also Orr* v. *Orr*, 440 U.S. 268, 277 n.6 (1979).

§§ 7433-34 (McKinney 1985 & Supp. 1992). Administrative expenses, secured claims and certain wage claims have priority over general unsecured claims including those of the United States. *Id.*; *see also* N.Y. Ins. Law § 7426 (McKinney 1985). Pursuant to 11 U.S.C. § 109(b)(2) (1988), Congress has deferred to the state system of insurance insolvency proceedings by providing that domestic insurance companies cannot be debtors in federal bankruptcy proceedings.

In contrast, the Federal Priority Statute addresses insolvency situations generally and provides for a first priority for federal claims. It is undisputed that, absent other federal law addressing this subject, the general federal priority law would govern under familiar principles of federal constitutional supremacy.

Petitioner submits, however, that McCarran-Ferguson resolves this state-federal conflict in favor of state law. The Act provides in relevant part:

> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012 (1988). Thus, McCarran-Ferguson requires that state law govern in all federal-state statutory conflicts provided that (1) the federal statute does not "specifically relate[ ] to the business of insurance" and (2) the state statute "relate[s] to the regulation or taxation of such business."

There is no question, and the United States has never disputed, that the Federal Priority Statute does not "specifically relate to the business of insurance." Thus, the question of the applicability of McCarran-Ferguson to the case at hand depends on whether the relevant state statute (here, the New York Insurance Law (McKinney 1985 & Supp. 1992)) "relate[s] to the regulation or taxation of [the business of insurance]." This was the principal issue briefed by the parties to the trial court. *See* App. 5a ("the parties have principally addressed themselves to whether the State statute setting priority of claims in liquidation proceedings constitutes the regulation of the business of insurance"). It is also the question considered determinative by every other appellate court, state or federal, to consider the issue. *Fabe*, *supra*, 939 F.2d at 343 (holding that state priority scheme for insolvent insurance companies governs because it regulates the business of insurance); *Idaho ex rel. Soward* v. *United States*, 858 F.2d 445 (9th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989) ("*Soward*") (holding that Federal Priority Statute governs because state priority scheme for insolvent insurance companies does not regulate the business of insurance); *Gordon* v. *United States Department of Treasury*, 668 F. Supp. 483 (D. Md. 1987), *aff'd per curiam*, 846 F.2d 272 (4th Cir.), *cert. denied*, 488 U.S. 954 (1988) ("*Gordon*") (same). *See also Langdeau* v. *United States*, 363 S.W.2d 327 (Tex. Civ. App. 1962) (same).

The courts below accepted an alternative McCarran-Ferguson analysis also advanced by the United States—an analysis that was argued to and rejected by the Sixth Circuit in *Fabe*, 939 F.2d at 348. As the trial court put it, "this court need not reach that issue [of whether the relevant provisions of the New York Insurance Law regulate the 'business of insurance'] to determine that no exception to [the Federal Priority Statute] has been created [by McCarran-Ferguson]" (App. 5a). New York state and federal courts that have reached the "business of insurance" issue have held that "the liquidation provisions of the Insurance Law were enacted 'for the purpose of regulating the business of insurance.' " *Cor-*

coran v. *Ardra Insurance Co.*, 156 A.D.2d 70, 73, 553 N.Y.S.2d 695, 697 (N.Y. App. Div. 1st Dep't 1990), *aff'd*, 77 N.Y.2d 225, 566 N.Y.S.2d 575, 567 N.E.2d 969 (1990), *cert. denied*, 111 S.Ct. 2260 (1991) (citation omitted). *See also Levy* v. *Lewis*, 635 F.2d 960, 963 (2d Cir. 1980); *Washburn* v. *Corcoran*, 643 F. Supp. 554, 556 (S.D.N.Y. 1986) ("contention that Article 74 [of the New York Insurance Law] is not a law enacted 'for the purpose of regulating the business of insurance' is untenable").

The trial court thus ignored the text of McCarran-Ferguson[5] and looked instead to its legislative history, finding that the legislative history suggested that Congress had meant to preserve the pre-McCarran-Ferguson *status quo* regarding the issue presented here (App. 5a-6a).[6] The court then found that the pre-McCarran-Ferguson *status quo* favored the Federal Priority Statute (App. 6a-7a). The trial court therefore ruled in favor of the United States (App. 7a), and the Appellate Division affirmed, adopting the reasoning of the court below (App. 1a).

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5 McCarran-Ferguson does not purport to "create exceptions" to given federal statutes. By its express terms, McCarran-Ferguson applies to *every* federal statute of general applicability. 15 U.S.C. § 1012.

6 The question of in what circumstances courts may look to the legislative history of a federal statute where the terms of that statute are express and clear is thus also presented by this case. *See Dewsnup* v. *Timm*, 112 S. Ct. 773, 781 (1992) (Scalia, J., dissenting).

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THAT OF THE SIXTH CIRCUIT IN *FABE* v. *UNITED STATES* (ITSELF IN ACKNOWLEDGED CONFLICT WITH DECISIONS OF THE FOURTH AND NINTH CIRCUITS) ON THE SIGNIFICANT QUESTION OF WHETHER THE McCARRAN-FERGUSON ACT REQUIRES THAT PRIORITY SCHEMES CONTAINED IN STATE INSURANCE STATUTES, RATHER THAN THE FEDERAL PRIORITY STATUTE, GOVERN THE DISTRIBUTION OF THE ASSETS OF INSOLVENT INSURANCE COMPANIES

The Sixth Circuit in *Fabe* v. *United States* reached a result precisely opposite to that reached by the court below, holding that state law governed "[b]ecause we find the Ohio insurance liquidation priority scheme at issue [*see* Ohio Rev. Code § 3903.42] to be a regulation of the 'business of insurance' within the meaning of the McCarran-Ferguson Act." 939 F.2d at 343.[7] The United States has acknowledged that the decisions are in direct conflict. Application at 5.

The Sixth Circuit itself acknowledged that its holding is in direct conflict "on the precise question raised in this appeal" with the Courts of Appeals for the Fourth and Ninth Circuits, citing *Gordon*, *supra*, and *Soward*, *supra*. *Fabe*, *supra*, 939 F.2d at 348 ("[b]oth [*Soward* and *Gordon*] rejected the argument that the liquidation priority statutes before them regulated the 'business of insurance,' though on divergent

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7 The Sixth Circuit analyzed the Ohio statute by reference to the three factors set out in this Court's decision in *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 129 (1982) ("*Pireno*"), holding that the state law "fulfills the *Pireno* requirements [and thus regulates the 'business of insurance'] because it (1) transfers the policyholders risk of loss by insolvency at the time of contracting, (2) is an integral part of the relationship between the insurer and insured, and (3) is exclusive in its operation to entities within the insurance industry." 939 F.2d at 351.

grounds").[8] *Id.* The court below, on the other hand, cited *Soward* and *Gordon* as consistent with its holding. App. 7a ("[i]t is of note that the federal courts, which have recently reviewed the interaction of these two statutes, have also determined that the United States government priority is unaffected by McCarran-Ferguson").

In addition to reaching a result contrary to that of the court below, the Sixth Circuit also rejected the McCarran-Ferguson analysis accepted by the court below.

> Before turning our attention to those cases which have considered the issue of whether such priority schemes may be considered a regulation of the "business of insurance," we must address [an] argument[ ] made by the United States which it argues [is] dispositive. The United States . . . contends that the issue before us was settled by the Supreme Court's 1936 opinion in *United States* v. *Knott*, 298 U.S. 544. . . . It argues that because McCarran-Ferguson "was an attempt to turn back the clock," the Supreme Court's pre-McCarran holding in *Knott*, that a Florida insurance priority law was subject to federal preemption, controls the outcome of the case before us. We disagree with this assertion on two grounds. First, McCarran-Ferguson did not return to the *status quo* prior to [*United States* v.] *South-Eastern Underwriters* [*Ass'n*, 322 U.S. 533 (1944)]; instead, it only permitted state regulation of the "business of insurance," without federal interference. [*Group*

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8 The Ninth Circuit in *Soward* applied the analysis of this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969), that for McCarran-Ferguson purposes "[s]tatutes aimed at protecting or regulating th[e] relationship [between the insurance company and the policyholder], directly or indirectly are laws regulating the 'business of insurance.' " Finding that the state priority scheme in question, *see* Idaho Insurance Code § 41-3342, did not focus on that relationship, the *Soward* court held that the state law "is *not* a law regulating the business of insurance." 858 F.2d at 452 (emphasis in original).

The Fourth Circuit in *Gordon*, like the Sixth Circuit in *Fabe*, looked to the *Pireno* factors. 846 F.2d at 273. It reached the opposite result. *Id.* at 273-74.

> *Life & Health Insurance Co.* v.] *Royal Drug [Co.]*, 440 U.S. [205,] 220 n. 24 [(1979)]. Second, even if it had, the Florida statute at issue in *Knott* contained only generalized provisions protecting domestic creditors in Florida insurance companies over foreign creditors; it in no way regulated the "business of the insurance" for the protection of the insured. *See National Securities*, 393 U.S. at 460 . . . (where focus is away from the protection of insureds statute does not regulate the "business of insurance").

Fabe, *supra*, 939 F.2d at 347-48.

The direct split between the court below and the Sixth Circuit as to both the proper McCarran-Ferguson analysis and the correct answer to the question presented here warrants this Court's attention, particularly as the Sixth Circuit is in acknowledged conflict with other federal circuits as to both analysis (*Soward*) and result (*Soward* and *Gordon*) on these same issues.

The resolution by this Court of the question presented is of crucial significance not only to state insurance departments but also to all those involved in the business of insurance, including policyholders and insurers, both solvent and insolvent. Commentators and journalists have taken note of the importance of the question presented.

> Recent insurance company liquidations have resulted in a series of brawls between the United States Government and the state insurance commissioners. At stake is nothing less than all of the funds marshalled by the estates of the insolvent insurers. Because the United States may claim all or most of an estate's funds, otherwise earmarked for the insurer's policyholders, the importance of the "Superpriority" debate eclipses all other insolvency-related disputes.

D. Howard & S. Stone, *The United States Versus The Liquidators of Insolvent Insurance Companies*, 13 Ins. Litig. Rep. 467 (1991) (footnote omitted). *See also* A. Hagedorn, *Policy-*

holders of Insolvent Insurers Face Big Losses from Rulings, Attorneys Say, Wall St. J., Oct. 12, 1988, at B8, col. 5 (reporting *Soward* and *Gordon* decisions).

Guidance from this Court is needed to prevent the disruption of the orderly liquidation of insolvent insurance companies. Also at stake is the States' interest in avoiding intrusion into their comprehensive insurance systems. In its Application in *Fabe*, the United States also stressed the importance to it of resolution by this Court of the question presented, noting that almost $11 million was at stake in *Fabe* alone and that the federal government "often has substantial claims against insolvent insurance companies in States with insolvency laws that do not give a first priority to the United States." Application at 5. For all of these reasons, the public importance of this issue thus also counsels in favor of review by this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted. Prior to considering the petition, however, petitioner respectfully urges the Court to await completion of briefing in connection with both this petition and that of the United States in the *Fabe* case discussed herein.

Dated: New York, New York
February 24, 1992

Respectfully submitted,

Mathias E. Mone
Counsel of Record
Adam Liptak
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

William F. Jerome
State of New York
Insurance Department
Liquidation Bureau
123 William Street
New York, New York 10038

Attorneys for Petitioner

APPENDIX

Carro, J.P., Kupferman, Asch, Kassal, JJ.

42214 In the Matter of the Liquidation of Union Indemnity Insurance Company of New York

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SALVATORE R. CURIALE, etc.,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Respondent.

Order and judgment (one paper), Supreme Court, New York County (Ira Gammerman, J.), entered July 17, 1990, affirmed, without costs, for the reasons stated by Gammerman, J. All concur except Asch, J., who concurs in the following memorandum:

ASCH, J. (concurring)

I agree with the affirmance for the reasons stated by Justice Gammerman. However, I would simply note that our decision in *Corcoran v. Ardra Insurance Co.*, 156 AD2d 70, does not conflict with the result reached herein. In *Ardra*, we found that the liquidation provisions of the Insurance Law were not invalidated or impaired by the provisions of the Federal Arbitration Act (9 USC Sec.1 et seq.) pursuant to the terms of the McCarran-Ferguson Act (15 USC Sec.1011 et seq.). In the instant matter, we deal with a different portion of the liquidation law and an entirely different federal statute. In addition, as noted by Justice Gammerman in his decision, the McCarran-Ferguson Act was enacted by Congress with the specific intent of preserving previous case law and "[t]he paramount nature of the priority created in the Federal Insolvency Statute was upheld in the context of insurance company liquidation prior to the enactment of McCarran-

Ferguson." (memorandum decision of February 5, 1990, at p.6).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: February 21, 1991

/s/ _____
Clerk

SUPREME COURT
NEW YORK COUNTY

IAS : PART 27

INDEX NO. 41292-85
Par Calendar No. 1912

In the Matter of the Liquidation of

UNION INDEMNITY INSURANCE COMPANY
OF NEW YORK

GAMMERMAN, J.:

The Superintendent of Insurance as Liquidator of Union Indemnity Insurance Company of New York ("Union") brings this application, pursuant to Insurance Law Section 7433 to allow a portion of the claim filed by the Internal Revenue Service ("IRS") as a general creditor claim. IRS opposes the application asserting that it has first priority under 31 USC 3713(a)(1)(A).

By stipulation dated September 15, 1989, the parties have agreed that "(t)he total allowed claim of the IRS for federal taxes and pre-liquidation interest and penalties upon taxes in the Union liquidation proceeding is $137,245.18." Thus, the amount of IRS' claim has been fixed and all that remains is the question of whether IRS is to be treated as a general creditor or if it should have priority over all other claimants.

IRS contends that the Federal Insolvency Statute 31 USC 3713(a)(1)(3) controls and grants priority to claims of the United States government for taxes due in cases of insolvency. The Liquidator argues that the McCarran-Ferguson Act, 15 USC 1011, et. seq., which vests the States with authority to regulate the business of insurance, mandates the application of State law governing priorities in insurer liquidations.

The Federal Insolvency Statute provides as follows:

§ 3713. Priority of Government claims.

(a)(1) A claim of the United States Government shall be paid first when—

(A) A person indebted to the Government is insolvent and—

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent is attached; or

(iii) an act of bankruptcy is committed.

This statute in more or less the same form has been in existence since the early days of the republic. (*See* Act of March 3, 1797 § 5, 1 Stat. 515). It owes its origin to a similar priority of the Crown in England, an aspect of the royal perogative, founded upon a policy of protecting the public revenues. *United States v. Key*, 397 U.S. 322 (1969). The same purpose underlies the current enactment. *United States v. State Bank of North Carolina*, 6 Pet. 29, 35 (1832); *United States v. Key*, *supra* at 324. The statute is to be construed liberally to effectuate its purpose. *United States v. Emery*, 314 U.S. 423, 426 (1941).

Here, there is an insolvency as defined by the statute and monies owed as taxes to the federal government which are covered by section 3713. *See United States v. Vermont*, 377 U.S. 351 (1964). Section 3713 is triggered unless another federal statute creates an exception. An exception occurs when the statutes expressly state it or when the statutes reflect the plainest inconsistency. *United States v. Emery*, *supra* at 433; *United States v. Key*, *supra* at 325. The Liquidator posits that the McCarran-Ferguson Act negates the priority.

McCarran-Ferguson in pertinent part provides as follows:

"§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.

(a) The business of insurance and every person engaged therein, shall be subject to the laws of the

> several States which relate to the regulation or taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948 . . . the Sherman Act and . . . the Clayton Act, and . . . The Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

McCarran-Ferguson contains no express provision excepting state insurance liquidation proceedings from the applicability of the Federal Insolvency Statute. Whether McCarran-Ferguson implicitly modifies Section 3713 is the issue before the court on this application.

While the parties have principally addressed themselves to whether the State statute setting priority of claims in liquidation proceedings constitutes the regulation of the business of insurance, this court need not reach that issue to determine that no exception to Section 3713 has been created. It is clear from the legislative history that McCarran-Ferguson was not intended to vest the States with any greater control over the insurance industry than previously existed prior to the pivotal decision in *South Eastern Underwriters Association*, 322 U.S. 533 (1944) (*See H. R. Rep. No. 193 79th Cong. 1st Sess. reprinted in* 1945 US Code Cong. & Adm. News 670, 671) which had prompted the adoption of McCarran-Ferguson in the first place.

The House Report explicitly states:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern

> Underwriters Association case. Briefly your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the Supreme Court. . . "

The courts, which have considered the legislative intent of McCarran-Ferguson, have concluded that it "was an attempt to turn back the clock, to assure the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 459 (1969). In *State of Idaho ex rel Soward v. United States*, 858 F2d 445 (9th Cir. 1988) *cert. den.* ____ U.S. ____, 109 S. Ct. 2063 (1989) the court noted that McCarron-Ferguson "was not intended to open new areas of regulatory discretion to the States, but rather to return the realm of insurance transactions to the *status quo ante.*"

The paramount nature of the priority created in the Federal Insolvency Statute was upheld in the context of insurance company liquidation prior to the enactment of McCarran-Ferguson. In 1935, the Supreme Court held that the claims of the United States government under the predecessor statute to 31 USC 3713, were entitled to priority over other creditors claims in state insurance liquidation proceedings. *United States v. Knott*, 298 US 544. Indeed, the courts of New York had previously recognized such priority in *In re Casualty Co. of America*, 196 A.D. 175 (1st Dep't) *aff'd* 232 NY 559 (1921). There it was established that "(t)he right of the United States government to preference cannot be defeated by any statute, nor by any rule adopted by the state court." *Id* at 176-177; *In re Kupshire Coats, Inc.*, 272 NY 221, 226 (1936); *Field v. United States* 34 US [9 Pet.] 182 (1835).

Since McCarran-Ferguson was not intended to work change in existing regulation of insurance, the Liquidator has failed to demonstrate any inconsistency between the two provisions, let alone a "patent inconsistency between the purposes" of the Federal Insolvency statute and McCarran-Ferguson *United States v. Emery*, *supra* at 430.

The balance between state regulation and federal interests was struck long before the enactment of McCarran-Ferguson and the Federal government's right to priority was sustained by both the United States Supreme Court and the New York Court of Appeals. It would be contrary to the clearly expressed intent of McCarran-Ferguson as well as in contravention of long-standing and controlling state and federal precedent, if this court were to accept the Liquidator's position and treat the IRS claim to taxes as that of general creditor. The claim of the United States government to $137,245.18 is entitled to first priority under 31 USC 3713(a)(1)(A).

It is of note that the federal courts, which have recently reviewed the interaction of these two statutes, have also determined that the United States government priority is unaffected by McCarran-Ferguson. *Cf. State of Idaho ex rel. Soward v. United States supra*; *Gordon v. United States Department of Treasury*, 846 F2d 272 (4th Cir) *cert. den.* ____ U.S. ____; 109 S. Ct. 390 (1988).

Accordingly, the petition to allow the claim of IRS in the sum of $137,245.18 as a general creditor is denied and the United States government is granted a first priority to the assets of the insolvent Union for its claim of $137,245.18.

This constitutes the decision and order of the Court.

Dated: February 5, 1990 J.S.C.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of November A. D. 1991

PRESENT,

HON. SOL WACHTLER,
Chief Judge, presiding.

1-10 Mo. No. 1047

In the Matter of the Liquidation of Union Indemnity Insurance Company of New York

SALVATORE R. CURIALE, &c.,
Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 13, 1991

PRESENT

HON. JOHN CARRO, *Justice Presiding*
THEODORE R. KUPFERMAN
SIDNEY H. ASCH
BENTLEY KASSAL,

Justices

M-2157

In the Matter of the Liquidation of Union Indemnity Insurance Company of New York

SALVATORE R. CURIALE, ETC.,
Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,
Respondent-Respondent.

Petitioner-appellant having moved for leave to appeal to the Court of Appeals from a decision and order of this Court (Appeal No. 42214) entered on February 21, 1991.

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and hereby is denied.

ENTER:

Clerk

At an IAS term, Part 27 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, in the Borough of Manhattan, City and State of New York on the day of 1990.

PRESENT:

Honorable Ira Gammerman,

Justice

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 41292/1985

In the Matter of the Liquidation of

UNION INDEMNITY INSURANCE COMPANY OF NEW YORK

ORDER AND JUDGMENT GRANTING PRIORITY TO INTERNAL REVENUE SERVICE CLAIMS

James P. Corcoran, Superintendent of Insurance of the State of New York, as Liquidator of Union Indemnity Insurance Company of New York having moved to partially allow claims submitted in this proceeding by the Internal Revenue Service and to disallow any claim of priority, and the United States of America ("the United States"), having objected to the disallowance of a claim of priority, and said motion and objections having regularly come to be heard,

Now, upon reading and filing of the Order to Show Cause dated March 23, 1989, the petition of the Liquidator dated March 17, 1989, the United States' Objections to the Petition dated May 22, 1989, and a Stipulation dated September 15, 1989, after due consideration having been held thereon, and

after the filing of the opinion dated February 5, 1990, annexed hereto as Exhibit A,

NOW upon the petition by the Liquidator and the objections by the United States, it is

ORDERED that the United States is granted first priority to the assets of the insolvent Union for the Internal Revenue Service's claim of $137,245.18, and it is further

ORDERED that the Liquidator's petition to allow the claim of the Internal Revenue Service as a general creditor is denied.

Enter,

_____

J.S.C.

FILED
July 17 1990
County Clerk's Office
New York

At a Special term, Part 1 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, in the Borough of Manhattan, City and State of New York, on the 16th day of July, 1985.

PRESENT:

HON. IRA GAMMERMAN

Justice.

Index No. 41292/1985

In the Matter of

the Application of

JAMES P. CORCORAN, as Superintendent of Insurance of the State of New York, for an order to take possession of and liquidate the business and affairs of UNION INDEMNITY INSURANCE COMPANY OF NEW YORK

ORDER OF LIQUIDATION

Petitioner, JAMES P. CORCORAN, Superintendent of Insurance of the State of New York (the "Superintendent"), having moved this Court by Order to Show Cause for an Order pursuant to Section 7417 of the Insurance Law to take possession of and liquidate the business and affairs of UNION INDEMNITY INSURANCE COMPANY OF NEW YORK ("UNION INDEMNITY"),

NOW, upon reading and filing the Order to Show Cause signed June 5, 1985 (per JAWN A. SANDIFER, J.) the Petition of JAMES P. CORCORAN, the Superintendent, sworn to the 4th day of June 1985 (the "Petition"), and the exhibits annexed thereto, with proof of due service thereof, in support of the motion; and the affirmation of EDWARD M. CAMERON, III dated June 25, 1985 with exhibits attached;

the affidavit of DOUGLAS L. KING sworn to July 9, 1985; the affidavit of DOUGLAS L. KING sworn to July 10, 1985 with exhibits attached, all in opposition thereto; and the undated So Ordered Stipulation of the Hon. LOUIS GROSSMAN, Justice of this Court; and it appearing to my satisfaction (i) that UNION INDEMNITY was incorporated under the laws of the State of New York on October 20, 1975 and licensed as a stock casualty insurer in the State of New York on October 20, 1975; (ii) that it is amendable to the Insurance Law of the State of New York and particularly to Article 74 thereof; (iii) that is is impossible to reinsure in whole or in part the existing policy obligations of UNION INDEMNITY pursuant to Section 7405 (c) of the Insurance Law; (iv) that the corporate charter as well as any rights and interest in licenses or certificates of authority to write insurance be vested in the Superintendent of Insurance; (v) that UNION INDEMNITY is insolvent, that it is in such condition that its further transaction of business would be hazardous to its policyholders, creditors or to the public, that it is to their best interests that this application should be granted and UNION INDEMNITY liquidated under and pursuant to Article 74 of the Insurance Law; and petitioner having appeared by Hon. ROBERT ABRAMS, Attorney General of the State of New York in support of said motion and UNION INDEMNITY having appeared by KROLL, POMERANTZ & CAMERON by ROY POMERANTZ, Esq. in opposition thereto, and after oral argument and hearing before this Court and after due deliberation having been made thereon and the duly recorded decision of this Court;

NOW, on motion of Hon. ROBERT ABRAMS, Attorney General of the State of New York, it is

ORDERED AND ADJUDGED, that the petition of the Superintendent is granted; and it is further

ORDERED AND ADJUDGED, that UNION INDEMNITY is insolvent; and it is further

ORDERED AND ADJUDGED, that JAMES P. CORCORAN, the Superintendent, or any successor in office as Superintendent, is hereby appointed Liquidator of UNION INDEMNITY, and is hereby authorized and directed forthwith to take possession of the property and liquidate the business and affairs of UNION INDEMNITY pursuant to Article 74 of the Insurance Law and to deal with the property and business of UNION INDEMNITY in his name as Superintendent, and is vested with title to all of the property, licenses, corporate charter, contracts and rights of action of UNION INDEMNITY pursuant to Section 7405 of the Insurance Law; and it is further

ORDERED AND ADJUDGED, that the notice aforesaid be given by publication in the national editions of the New York Times and The Journal of Commerce, commencing on or about the 9th day of August, 1985, and thereafter once a week for two successive weeks; and it is further

ORDERED AND ADJUDGED, that notice of liquidation be given by publication of such notice in one newspaper in Washington, D.C. and San Juan, Puerto Rico, as well as the Capitals of the Provinces of Canada, and in all the Capital Cities of the States in the United States except California, Maryland, North Carolina, South Dakota and Wyoming, and in the newspapers in other cities to be selected by the Liquidator in his discretion, by publication of such notice once a week for two successive weeks within the period allowed for the filing of claims, the newspaper to be selected by the the Liquidator in his discretion; and it is further

ORDERED AND ADJUDGED, that the notice prescribed is sufficient notice to all persons interested in the assets of UNION INDEMNITY; and it is further

ORDERED AND ADJUDGED, that notice of the making and entry of this order be given by the Superintendent, as Liquidator, to the extent it can be reasonably ascertained, by mail to all policyholders, creditors and all other persons having any unsatisfied claim or demand of any character against the

corporation in the possession of the Superintendent, as Liquidator, at the last known address of such persons as disclosed by said records and in such other manner and form as he in his discretion may find desirable, demanding that all persons indebted to UNION INDEMNITY render accounts of their indebtedness and pay any sums due to the Superintendent, as Liquidator; and giving notice to present proofs of claim with the Superintendent, as Liquidator, at a place specified in such notice within twelve months from the date of the entry of this Order and no later than the 17th day of July, 1986; and that such notice may contain such other rules, regulations and information as the Superintendent, as Liquidator, may deem necessary for the purpose of this proceeding in fixing and determining all lawful and valid claims and demands against the corporation; and it is further

ORDERED AND ADJUDGED, that in the event one or more Insurance Departments and/or Guaranty Funds or Associations of foreign States that have adopted the Uniform Insurers Liquidation Act in which respondent was licensed to do business, desire to give formal notice to policyholders and creditors in their respective states to present proofs of claim to the respective State Insurance Department or Guaranty Fund or Association, the Superintendent, as Liquidator, may permit the giving of such notice as he in his discretion may find desirable; and it is further

ORDERED AND ADJUDGED, that all outstanding policy and other insurance obligations of UNION INDEMNITY terminate and all liability thereunder cease and be fixed as of 12:01 A.M. Eastern Daylight Savings Time on August 17, 1985, or prior thereto upon the procurement by policyholders of new insurance covering their risks insured thereby, and notice thereof shall be given as hereinabove set forth; and it is further

ORDERED AND ADJUDGED, that all other subsisting contracts, leases, tax sharing agreements, individual labor contracts and other obligations of UNION INDEMNITY terminate,

and all liability thereunder cease and be fixed as of the date of the entry of this Order; and it is further

ORDERED AND ADJUDGED, that the Superintendent, as Liquidator, is relieved of the provisions set forth in Section 7405(c) of the Insurance Law, to wit: to reinsure in whole or in part the policy obligations of UNION INDEMNITY; and it is further

ORDERED AND ADJUDGED, that JAMES P. CORCORAN, the Superintendent or any successor in office as Superintendent, is hereby authorized, permitted and allowed to sell, assign and transfer any and all stocks, bonds and securities in his possession or which may hereafter come into his possession belonging to UNION INDEMNITY, in liquidation, at market price or better, or when there is no market price, at the best price obtainable, at private sale and at such times and upon such terms and conditions as in his discretion he deems for the best interests of the creditors of UNION INDEMNITY, in liquidation, and that he be authorized, permitted and allowed to take such steps and to make and execute such agreements and other papers as may be necessary to effect and carry out such sales, transfers and assignments; and it is further

ORDERED AND ADJUDGED, that JAMES P. CORCORAN, the Superintendent or any successor in office as Superintendent, is hereby authorized, permitted and allowed to sell, assign and transfer the Corporate Charter of UNION INDEMNITY and any and all insurance licenses or certificates of authority to write insurance in such a method and manner as is to be approved by this Court; and it is further

ORDERED AND ADJUDGED, that UNION INDEMNITY, its officers, directors, trustees, policyholders, agents and employees and all other persons having any property or records belonging to UNION INDEMNITY, are hereby directed to assign, transfer and deliver to the Superintendent, as Liquidator, all of such property in whomsoever the same may be, and that any persons, firms or corporations having any

books, papers or records relating to the business of said corporation shall preserve the same and submit them to the Superintendent, as Liquidator, for examination at all reasonable times; and it is further

ORDERED AND ADJUDGED, that the officers, directors, trustees, policyholders, agents and employees of UNION INDEMNITY, and all other persons are enjoined and restrained from the further transaction of business or from dealing with or disposing of the property or assets of said corporation, or doing or permitting to be done any act or thing which might waste its property or assets or allow or suffer the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against said corporation, or its estate while in the possession and control of the Superintendent, as Liquidator; and it is further

ORDERED AND ADJUDGED, that the officers, directors, trustees, policyholders, agents and employees of UNION INDEMNITY, and all other persons, including but not limited to claimants, plaintiffs, and petitioners who have claims against UNION INDEMNITY, are permanently enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate, or the Superintendent and his successors in office, as Liquidator thereof, or from making or executing any levy upon the property or estate of said corporation, or from in any way interfering with the Superintendent, or any successor in office, in his possession, or in the discharge of his duties as Liquidator thereof, or in the liquidation of the business of said corporation; and it is further

ORDERED AND ADJUDGED, that all parties to law suits in this State and all other states and territories of the United States, are hereby enjoined and restrained from proceeding with any pre-trial conference, trial, application for judgment, or proceeding on judgments or settlements in such actions at law, suits in equity, special or other proceedings in which

UNION INDEMNITY is obligated to defend by virtue of its insurance contract for a period of 180 days from the date hereof; and it is further

ORDERED AND ADJUDGED, that those persons who may have first-party or New York Comprehensive Automobile Insurance Reparations Act (No-Fault) policyholder loss claims against UNION INDEMNITY coming within the purview of Article 76 of the Insurance Law, are enjoined for 90 days from the date hereof from presenting and filing such formal claims in this proceeding pursuant to Section 7432 of the Insurance Law; and it is further

ORDERED AND ADJUDGED, that all further papers in this proceeding shall bear the caption and be entitled:

"SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of

the Liquidation of

UNION INDEMNITY INSURANCE COMPANY
OF NEW YORK"

in place and stead of the caption as heretofore used; and it is further

ORDERED AND ADJUDGED, that the Superintendent, as Liquidator, may at any time make further application for such further and different relief as he sees fit.

ENTER

J.S.C.

§ 7426. Priority of claims for wages

All wages owing to employees of an insurer, against whom a proceeding under this article is commenced, for services rendered within one year prior to the commencement of such proceeding, not exceeding one thousand two hundred dollars to each employee, shall be paid prior to the payment of every other debt or claim except as provided in paragraph five of subsection (b) of section seven thousand four hundred three of this article, and in the discretion of the superintendent may be paid as soon as practicable after the proceeding has been commenced, except that at all times the superintendent shall reserve such funds as will in his opinion be sufficient for the expenses of administration.

* * *

§ 7433. Proof of allowance of claims

(a)(1) A proof of claim shall consist of a written statement subscribed and affirmed by the claimant as true under the penalties of perjury, setting forth the claim, the consideration therefor, any securities held therefor, any payments made thereon, and that the sum claimed is justly owing from the insurer to the claimant.

(2) If a claim is founded upon an instrument in writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. After the filing of such instrument the superintendent may in his discretion permit the claimant to retain such instrument until final disposition of the claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim.

(b)(1) Upon the liquidation of any domestic insurer or United States branch which has issued policies insuring the lives of persons, the superintendent shall, within thirty days after the last day set for filing claims, make a list of the persons who have not filed proofs of claim with him, to whom it appears to his entire satisfaction, from the records of the company, that there are owing amounts on such policies and

he shall set opposite the name of each person such amount so owing to such person. Each person whose name shall appear upon such list shall be deemed to have duly filed, prior to the last day set for the filing of claims, a proof of claim for the amount set opposite his name.

(2) Upon the liquidation of any domestic insurer or United States branch which has issued property/casualty policies, the superintendent shall, within thirty days after the last day set for filing claims, make a list of all persons whose name appears on the books and records of the company as policyholders or claimants. Each person whose name appears upon such list shall be deemed to have duly filed a proof of claim prior to the last day set for the filing of claims.

(c) No contingent claim shall share in a distribution of assets of an insurer adjudicated to be insolvent by an order made pursuant to section seven thousand four hundred thirty-two of this article except that any such claim shall be considered if properly presented and may be allowed to share if:

(1) it becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim, or

(2) there is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.

(d)(1) Where a liquidation, rehabilitation or conservation order has been entered in a proceeding against an insurer under this article, any person who has a cause of action against an insured of such insurer under a liability insurance policy issued by such insurer, shall have the right to file a claim in the proceeding, even though the claim is contingent.

(2) The claim may be allowed:

(A) if it may be reasonably inferred from the proof presented that such person would be able to obtain a judgment upon such cause of action against such insured;

(B) if such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no

further valid claims against such insurer arising out of his cause of action other than those already presented can be made; and

(C) if the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation, rehabilitation or conversation.

(3) No judgment against such an insured taken after the date of the entry of the liquidation, rehabilitation or conservation order shall be considered in the proceedings as evidence of liability or of the amount of damages. No judgment against an insured taken by default, inquest or collusion prior to the entry of a liquidation order shall be considered as conclusive evidence in the proceeding either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

(e) Debts owing to a state, county, district or municipality, or any subdivision thereof, as a penalty or forfeiture, shall not be allowed except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby, and such interest as may have accrued thereon according to law.

(f) No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of entry of the order of liquidation or such other date set by the court for fixation of rights and liabilities as provided in section seven thousand four hundred five of this article, unless the claimant shall surrender his security to the superintendent in which event the claim shall be allowed in the full amount of its value.

§ 7434. Distribution of assets

(a) Upon the recommendation of the superintendent, the court shall direct the manner in which payments and dividends to creditors shall be made.

(b) No creditor shall be entitled to interest on any dividend by reason of delay in payment of such dividend.

(c) Any claimant of another state or foreign country who is entitled to, or receives, a dividend upon his claim out of a statutory deposit or the proceeds of any qualifying bond or other asset located in such other state or foreign country shall not be entitled to any further dividend from the superintendent until all other claimants of the same class irrespective of residence or place of the acts or contracts upon which their claims are based shall have received an equal dividend upon their claims. After such equalization, such claimant shall be entitled to share in the distribution of further dividends by the superintendent like all other creditors of the same class wherever residing.

(d) If, after an adjudication of insolvency, a mutual insurer is found clearly solvent upon re-examination, its surplus shall be distributed among all persons, partnerships or corporations whose membership did not cease earlier than five years prior to the date on which the insurer ceased issuing policies. The distribution shall be in the proportion which the total premium contributions of each such member during his or its entire membership in the insurer bear to the total premium contributions of all such members entitled under this subsection to any distributive share of such surplus.

No. 91-1347

(2)

APR 24 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

SALVATORE R. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
WILLIAM KANTER
JENNIFER H. ZACKS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a state statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law regulating "the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1012, such that the state statute is not preempted by the federal priority statute, 31 U.S.C. 3713(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1347

SALVATORE R. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decision of the Appellate Division of the Supreme Court of New York (Pet. App. 1a-2a) is reported at 566 N.Y.S.2d 853. The opinion of the Supreme Court of New York (Pet. App. 3a-7a) is reported at 551 N.Y.S.2d 446.

JURISDICTION

The judgment of the Appellate Division was entered on February 21, 1991. On November 25, 1991, the Court of Appeals of New York denied petitioner's motion for leave to appeal. Pet. App. 8a. The petition for a writ of certiorari was filed on Monday, February 24, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. Petitioner Salvatore Curiale, New York's Superintendent of Insurance, is the liquidator of Union Indemnity Insurance Company of New York, an insolvent insurance company. The Internal Revenue Service (IRS) filed a claim against the insolvent insurer for $137,245.18 in taxes, interest, and penalties. The IRS asserted that its claim was entitled to first priority under the federal priority statute, 31 U.S.C. 3713.[1] Pet. App. 3a.

Petitioner brought suit in the New York Supreme Court challenging the IRS's claim of first priority. Petitioner contended that the priority of the IRS's claim is not governed by the federal priority statute, but rather by New York's statute establishing the priority of claims in insurance insolvency proceedings. Under the New York priority statute, the IRS's claim is treated as a general creditor claim that ranks behind administrative expenses, secured claims, and certain wage claims. See N.Y. Ins. Law. §§ 7433-7434 (McKinney 1985 & Supp. 1992). Petitioner argued that the federal priority statute does not preempt the state statute because the statute is a regulation of "the business of insurance" within the

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[1] The federal priority statute provides, in part:

> (a) (1) A claim of the United States Government shall be paid first when—
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> > (A) a person indebted to the Government is insolvent and—
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> > > (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
> > >
> > > (ii) property of the debtor, if absent, is attached; or
> > >
> > > (iii) an act of bankruptcy is committed * * *.

31 U.S.C. 3713(a)(1)(A).

meaning of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*[2] Pet. App. 3a; Pet. 6-7.

2. The New York Supreme Court held that the claim of the United States is entitled to first priority. Pet. App. 3a-7a. The court noted that the federal priority statute "in more or less the same form has been in existence since the early days of the republic," and is "founded upon a policy of protecting the public revenues." Pet. App. 4a (citing *United States* v. *Key*, 397 U.S. 322 (1969)). The court also noted that a tax liability is a debt within the meaning of the federal priority statute. Pet. App. 4a (citing *United States* v. *Vermont*, 377 U.S. 351 (1964)).

The court concluded that it was not required to decide whether the New York statute establishing the priority of claims in a liquidation proceeding regulates "the business of insurance" within the meaning of the McCarran-Ferguson Act. Instead, the court concluded that the McCarran-Ferguson Act was intended to restore the States' authority to regulate insurers as it had existed prior to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The court observed (Pet. App. 6a) that "[t]he paramount nature of the priority created in the Federal Insolvency Statute was upheld in the context of insurance company liquidation" prior to the *South-Eastern Underwriters* decision. In 1936, this

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[2] The McCarran-Ferguson Act provides, in part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance * * *.

15 U.S.C. 1012.

Court held that the federal priority statute applied in a state proceeding to liquidate an insolvent insurance company despite a state statute providing that in-state creditors would be paid ahead of all other creditors. *United States* v. *Knott*, 298 U.S. 544 (1936). Similarly, the New York courts recognized, prior to *South-Eastern Underwriters*, that the federal priority statute applied in insurance company liquidation proceedings, and that "[t]he right of the United States government to preference cannot be defeated by any State statute, nor by any rule adopted by the State court." *In re Casualty Co. of America*, 196 A.D. 175, 176-177 (1st Dep't), aff'd, 232 N.Y. 559 (1921). In light of these decisions, the court concluded that "[i]t would be contrary to the clearly expressed intent of McCarran-Ferguson as well as in contravention of long-standing and controlling state and federal precedent, if this court were to accept [petitioner's] position and treat the IRS claim to taxes as that of [a] general creditor." Pet. App. 7a.

3. The Appellate Division affirmed without opinion. Pet. App. 1a-2a. Judge Asch concurred. He observed that the trial court's decision does not conflict with a New York case holding that the liquidation provisions of New York's insurance law are not impaired by the provisions of the Federal Arbitration Act, 9 U.S.C. 1 *et seq.* Judge Asch noted that "[i]n the instant matter, we deal with a different portion of the liquidation law and an entirely different federal statute." Pet. App. 1a.

The New York Court of Appeals denied petitioner's motion for leave to appeal. Pet. App. 8a.

ARGUMENT

The government has filed a petition for a writ of certiorari in *United States Dep't of the Treasury* v. *Fabe*, petition for cert. pending, No. 91-1513. The question presented in that case is "[w]hether a state statute

establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law regulating 'the business of insurance' within the meaning of the McCarran-Ferguson Act." 91-1513 Pet. at I. In our petition for a writ of certiorari we note that the decision of the United States Court of Appeals for the Sixth Circuit in *Fabe* conflicts with the decisions of two other courts of appeals. See *id.* at 6 (citing *Idaho ex rel. Soward* v. *United States*, 858 F.2d 445 (9th Cir. 1988), cert. denied, 490 U.S. 1065 (1989); *Gordon* v. *United States Dep't of the Treasury*, 846 F.2d 272 (4th Cir.), cert. denied, 488 U.S. 954 (1988)). Our petition also notes that the Sixth Circuit's decision in *Fabe* conflicts with state court decisions, including the decision in this case. See 91-1513 Pet. at 6 (citing *In re Union Indemnity*, 551 N.Y.S.2d 446 (Sup. Ct. 1990), aff'd *sub nom. Curiale* v. *United States*, 566 N.Y.S.2d 853 (App. Div. 1991); *Langdeau* v. *United States*, 363 S.W.2d 327 (Tex. Civ. App. 1962)). Accordingly, we agree with petitioner that the decision of the Appellate Division of the New York Supreme Court in this case conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *Fabe*. We also agree that the question presented is important and is ripe for review by this Court.[3]

We believe, however, that *Fabe* is a better vehicle than this case for resolving the conflict in the lower courts. *Fabe*, unlike this case, created the type of conflict that ordinarily warrants review by this Court. In *Fabe*, the Sixth Circuit rendered a decision that is in conflict with the decisions of other courts of appeals. In this case, in

[3] The decision of the Appellate Division of the New York Supreme Court conclusively disposes of the petitioner's claim that the federal priority statute does not apply to the IRS's tax claims. Consequently, the judgment of the Appellate Division of the New York Supreme Court appears to be final within the meaning of 28 U.S.C. 1257. See *Clark* v. *Williard*, 292 U.S. 112, 117-119 (1934).

contrast, the New York Court of Appeals (New York's court of last resort) declined to hear petitioner's case. Because this case was not decided by a state court of last resort, it would not ordinarily warrant review by this Court. See Sup. Ct. R. 10.1 (a) and (b).

In addition, the Sixth Circuit's decision in *Fabe* offers the Court a more fully developed analysis of the question presented. Each of the three judges on the Sixth Circuit panel in *Fabe* wrote a separate opinion. Considered together, the three opinions in *Fabe* thoroughly discuss the question presented. The opinion of the New York trial court in this case is considerably less comprehensive. In particular, the New York court found it unnecessary even to consider whether a state priority statute regulates "the business of insurance," because the court concluded that the McCarran-Ferguson Act was not intended to alter prior judicial decisions holding that the federal priority statute applies in state proceedings to liquidate an insolvent insurance company.

Although the decision of the Appellate Division of the New York Supreme Court ordinarily would not warrant review by this Court, this case presents the same question as *Fabe*. If the Court grants the petition for a writ of certiorari in *Fabe*, the decision in that case will control the outcome of this case. Accordingly, the petition for a writ of certiorari in this case should be held pending the Court's disposition of *Fabe*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *United States Dep't of the Treasury* v. *Fabe*, petition for cert. pending, No. 91-1513. If the Court denies the petition for a writ of certiorari in *Fabe*, the petition for a writ of certiorari in this case should be denied. If the Court grants the petition for a writ of

certiorari in *Fabe*, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Fabe* and then disposed of as appropriate in light of that decision.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
JENNIFER H. ZACKS
Attorneys

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